American Transportation Service, Inc. *and* Burnell Ware, Jr. Case 16–CA–15158

January 29, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On June 30, 1992, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Transportation Service, Dickinson, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's finding that Ware was discharged for engaging in protected concerted activity in violation of Sec. 8(a)(1). We find it unnecessary to pass on whether the discharge also violated Sec. 8(a)(3).

Robert G. Levy II, Esq., for the General Counsel.
Charles E. Sykes, Esq. and *Angela D. Mazzu, Esq.*, with him on brief (*Bruckner & Sykes*), of Houston, Texas, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on January 30, 1992, in Houston, Texas, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 16 of the National Labor Relations Board (the Board) on September 11, 1991, based on a charge filed on July 31, 1991, and docketed as Case 16–CA–15158 by Burnell Ware Jr., an individual (the Charging Party), against American Transportation Service, Incorporated (Respondent).[1] Posthearing briefs were submitted by the parties on March 5, 1992.

The complaint alleges that Respondent discharged the Charging Party because of his protected right not to cross a picket line established by a labor organization thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). Respondent denies that it violated the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record,[2] including helpful briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with an office and place of business in Texas City and Dickinson, Texas, where it is engaged in the business of transporting chemicals and hazardous materials. Respondent during the 12 months preceding the issuance of the complaint here, a representative period, in the course and conduct of its business operations, performed services in connection with its hauling for United Carbide Corporation and Amoco Oil Company valued in ex-

[1] The charge, complaint, and answer each referred to Respondent as ''American Transportation Services, Inc.'' Respondent's posthearing brief refers to Respondent as ''American Transportation Service, Inc.'' Respondent's printed ''Uniform Rules and Regulations'' in evidence as G.C. Exh. 4 asserts Respondent is titled: ''American Transportation Service, Incorporated.'' Respondent's president, Chief Operating Officer and Chief Financial Officer Elmer Kernan, testified that Respondent's corporate title is ''American Transportation Service, Incorporated.'' On my own motion, I correct the caption to conform to the corporate title testified to by Kernan.

[2] Counsel for the General Counsel Levy requested I make an in camera inspection of numerous documents tendered to him by Respondent pursuant to subpoena so that he might establish the fact that a particular document was not present and presumably did not exist. I declined to undertake an in camera inspection under the circumstances holding the procedure was not a proper means of establishing facts relevant to the merits of the case. An in camera inspection is a procedure whereby trial judges inspect nonpublic documents supplied by a party before ruling on issues of the admissibility of evidence. Such a procedure allows admissibility determinations or other procedural determinations to be made without disclosure of documents or portions of documents to the opposing parties or to the public. The documents at issue here had been given by Respondent to the General Counsel and were therefore not documents which were unknown to either party to the proceeding. There was no need to limit their disclosure. Finally, counsel sought by invoking the procedure to establish the simple fact that the tendered documents did not include a particular document or type of document, a matter not involving a judicial determination respecting admissibility, but rather an exercise properly undertaken by the custodian of documents under subpoena or some other witness under oath. There was therefore no legitimate basis for an in camera inspection of the documents and no legitimate role for the trial judge to play in establishing the sought after factual evidence. I therefore reaffirm my ruling at trial denying the request.

[3] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

cess of $50,000, which services included the transportation of chemicals and hazardous materials directly from Texas City, Texas, to other States of the United States.

The complaint alleges, the answer admits, and I find that Respondent at all material times has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) and its constituent locals are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a corporation which provides drivers and other personnel to corporations in the trucking industry. Respondent operates out of various facilities in the States of Texas and Louisiana. Burnell Ware Jr. was employed by Respondent as a chemical transport driver commencing in July 1990 and extending to April 11, 1991. The Charging Party usually undertook driving assignments which originated in the Texas City/Dickinson area and involved travel to various locations in Louisiana, Texas, and other States.

Matlack, Inc., a client of Respondent, operated several terminals in Louisiana at least some of which were visited by the Charging Party in the normal course of his employment. At least some of the employees of these terminals were represented by the Union.

Respondent maintains a set of ''Uniform Rules and Regulations'' which apply, inter alia, to drivers such as Ware. Under rule 3, conduct is subsection g: ''Refusal to work or perform duty, if qualified, fit and able; Voluntary Quit.''

B. *Events*

In January and in late March 1991, the Charging Party was threatened by Matlack union drivers at the Channelview, Texas terminal. He testified he was told in March that:

> [P]retty soon, within a few days, that Matlack would be going on strike and that if we knew what was good for us, the union—the non-union guys, particularly I would—I shouldn't return to that terminal again, unless I risked bodily harm.

The Charging Party testified that he reported these threats to his supervisor, Richard Armstrong, Respondent's Dickinson, Texas terminal dispatcher, and was told it would be taken care of.

The Union through its various locals commenced a strike and put picket lines in place at all Matlack facilities on April 11, 1991.

The Charging Party testified that consistent with normal practice, Armstrong telephoned him at his residence about 8 o'clock in the morning of April 11, 1991. He recalled they had a conversation about a Matlack assignment for that day involving the pickup of a trailer from the Matlack Sulfur Terminal in Louisiana. Armstrong told him ''every terminal in Louisiana was on strike.'' The Charging Party testified:

> [Armstrong] told me to pack some things, that I was going to be going to Louisiana for awhile; that the union drivers over there had went on strike.
>
> At that time I told Mr. Armstrong that I was afraid to go to Louisiana because of the threats that were made against me in March. . . . I told him I would come in and speak to him about it in person.

The Charging Party drove to the terminal and there had a conversation alone with Armstrong in the dispatch office perhaps an hour later. The Charging Party testified:

> I came in; I said, Mr. Armstrong, I have some—I have lost my—I said, I have apprehensions about going to Louisiana, into a strike zone, because, as I told you before, I was threatened by the same union members.
>
> And he told me that either I was going to take the run or I was—to clean out my truck. I told him that I didn't think it was fair, and would like an assignment—if it was okay with him, could he assign me to an area that I didn't have to risk bodily harm.
>
> He told me either I would go [to] Louisiana or I was fired.

The Charging Party further recalled that when he had complained to Armstrong about the Matlack, Sulphur, Louisiana terminal run, Armstrong ''told me that when I went there I was to meet a guy around the corner from the terminal, and the guy would bring a trailer out to me.'' The Charging Party denied that Armstrong ever told him that he would not have to cross a picket line. On his statement to the Texas state unemployment agency he described Armstrong's April 11, 1991 conversation with him:

> I was going to fill in for the striking employees. They were saying I would never have to cross a picket line but I felt I would still be in danger.

In his Board affidavit, the Charging Party asserted: ''I refused to travel to the state of Louisiana, to work in a strike zone.'' At the hearing he adopted that statement as true.

The Charging Party testified he asked Armstrong if he would give the Charging Party a statement as to the reason he was being fired. Armstrong told him to ''clean out the truck and turn in my gas card and motel card and keys.'' The Charging Party did as requested. His employment ended. A photostatic copy of a portion of Respondent's uniform rules with quoted rule 3(g) circled was placed in the Charging Party's personnel file. Ware had not been offered reinstatement as of the date of the trial.

C. *Analysis and Conclusions*

1. Resolution of credibility

There were few factual disputes. The Charging Party was the only witness to the events in issue. Armstrong did not testify. My findings below are based on my crediting the Charging Party's uncontradicted testimony and taking the most credible and probable sequence of events where his testimony was not consistent with his prior statements.

I find that the Charging Party was threatened as he testified and that he reported these experiences to Armstrong.

Considering the threats and the lack of apparent action taken after they were reported, I also find, first, that the Charging Party believed that he was at physical risk if he antagonized the strikers by doing struck work and, second, that it was not unreasonable for him to hold such a belief. Further, on the day the strike started, April 11, 1991, I find that the Charging Party was told by Armstrong that he was to fill in for Matlack union drivers in Louisiana by, initially, picking up a trailer outside the Matlack Sulfur, Louisiana terminal. Thus, I find that the Charging Party was not asked to and could not have reasonably believed this initial assignment in his tour of duty in Louisiana would involve crossing a picket line at the terminal.

Crediting the Charging Party's testimony, I further find that Armstrong also told the Charging Party that he would be in Louisiana for ''awhile'' because of the Matlack union drivers' strike. From Armstrong's statements as testified to by the Charging Party, I also find the Charging Party could fairly expect his work assignments to involve the work normally done by the striking Matlack drivers and that he so believed. Although it was not necessarily reasonable for the Charging Party to conclude that the work assignment would involve crossing of picket lines, I find that it was reasonable for the Charging Party to conclude and that he did conclude that Armstrong's assignment would put him for a substantial period or periods in the ''strike zone'' doing struck work.

I further find that the Charging Party expressed his fears of harm in such circumstances and sought another assignment of Armstrong. Finally, I find that Respondent, without any business reasons offered on this record, told the Charging Party he must accept the assignment or end his employment and terminated him when he continued to refuse the assignment.

2. Legal arguments

The General Counsel argues that the Charging Party in refusing to accept the assignment of work normally undertaken by the Matlack drivers on strike became a sympathy striker standing in the shoes of the strikers themselves. The General Counsel further argues that because there is no contention that the strike was illegal, the Charging Party is therefore entitled to all the rights of a striker. As such, asserts the General Counsel, he is protected from discharge. Accordingly, argues the General Counsel, Respondent's termination of the Charging Party—an action without even an argued justification or excuse by Respondent on this record—violates Section 8(a)(1) and (3) of the Act.

Respondent does not challenge the general proposition that sympathy strikers are protected from discharge nor assert a business justification for the actions it took. Rather counsel for Respondent makes two specific arguments contending that the Charging Party's actions were not protected concerted activity. First, Respondent argues, noting that the Charging Party's actions here were based on ''fear for his personal safety'' rather than support for or solidarity with striking employees, that the Charging Party was not engaged in protected activity. The General Counsel does not address this issue on brief.

The Board in *ABS Co*., 269 NLRB 774 (1984), squarely dealt with the issue at hand. In that case the employee involved was a secretary who telephoned her employer and told her superior that she would not come to work across a picket line ''for the sole reason that she feared for her personal safety.'' She was instructed to come to work, refused to do so, and was discharged in consequence. The Board, then Chairman Dotson dissenting, stated at 774–775:

> It is well established that nonstriking employees who refuse to cross a picket line maintained by their fellow employees have made common cause with the strikers and are engaged in protected concerted activities as defined in Section 7 of the Act, and may not be lawfully discharged for these activities.[1] According to Board policy, it is not material that the employee who refuses to cross the picket line is not a member of the picketing union, is not represented as part of the collective-bargaining unit, or is motivated solely by personal fear.[2]
>
> Based on the facts as stipulated by the parties, employee Duff was discharged because she refused to cross the picket line maintained by a union to which she did not belong. The Respondent's sole argument is that Duff was motivated by fear alone, which the Respondent contends is not protected activity under Section 7 of the Act. On the contrary, the focal point of the Board's inquiry is the nature of the activity itself; the employee's motives for engaging in the activity are irrelevant. Accordingly, we find that the Respondent discharged Duff for engaging in an activity protected by Section 7 of the Act, and that the Respondent thereby committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

[1] *NLRB v. Southern Greyhound Lines*, 426 F.2d 1299 (5th Cir. 1970); *NLRB v. Difco Laboratories*, 427 F.2d 170 (6th Cir. 1970).

[2] *Overnight Transportation Co*., 212 NLRB 515 (1974); *Congoleum Industries*, 197 NLRB 534 (1972); *Cooper Thermometer Co*., 154 NLRB 502 (1965).

See also *Limpert Bros*., 276 NLRB 364 (1985).

Second, Respondent argues, noting the Charging Party was never asked to cross or even approach the picket line, that the Charging Party's refusal to accept his assignment was not related to the picket line or a desire to avoid crossing a picket line as the complaint explicitly alleges. Rather his fears were much more general and unfocused and hence not within the protection of the Act. Thus Respondent agues on brief at 3: ''An employee is afforded no protection by the National Labor Relations Act for refusal to work in a state in which a strike is going on.'' Respondent further cites *Gibraltar Steel*, 273 NLRB 1012 (1984), for the proposition that the Charging Party's actions were individual acts and not concerted and hence protected activities.

The General Counsel meets this argument by asserting that it was not the Charging Party's refusal to cross a picket line which was the protected concerted action under Section 7 of the Act, but rather the Charging Party's desire to avoid undertaking the Matlack drivers' ''struck work.'' The General Counsel asserts that sympathetic conduct need not be limited under Board cases to simple refusals to cross picket lines but rather extends to the wider range of conduct undermining the strike such as doing ''struck work.'' Thus the General Counsel argues that the Board has held in *Supermarkets General Corp*., 296 NLRB 1138 (1989), that it is protected concerted activity under Section 7 of the Act to refuse to perform ''struck work.''

3. Conclusions

I have found that the Charging Party refused a specific assignment to do work heretofore done by Matlack organized truckdrivers who had commenced a strike that same day and he clearly communicated that fact to Respondent. As such I find that he made common cause with those striking employees and that Respondent's admitted agent knew that he had done so. Thus, based on the cases cited, I reject Respondent's argument that only the act of refusing to cross a picket line is sympathy conduct protected by the Act. To the contrary I accept the proposition of the General Counsel that the Charging Party made such common cause when he refused to do the ''struck work,'' i.e., the work which would have been done by the striking Matlack drivers but for the strike. I find that the making of a common cause with striking employees is neither logically nor in the Board's decisional analyses limited to simply honoring a picket line. Rather such conduct may extend to any actions reasonably designed to undermine the strikers or their strike. A refusal to do the work which would normally be done by the strikers, i.e., struck work, is such conduct. I therefore reject Respondent's second asserted defense noted supra.

I also reject Respondent's first argument that the Charging Party's fear of injury at the hands of the strikers is not a basis for holding his conduct concerted with the strikers. In this regard *ABS Co*., 269 NLRB 774 (1984), is definitive. Finally, I find Respondent's cited case, *Gibraltar Steel Corp*., 273 NLRB 1012 (1984), inapposite. That case involved an employee's support of a strike by owner-operators of trucks under the auspices of the Independent Truckers Association protesting Federal Government policies. There were simply no statutory employees engaged in the strike with whom to make common cause. Thus in these highly unusual circumstances where only a single employee was ever involved, no concerted activities were found. The holding is therefore essentially unique and not applicable to the more common sympathy case such as the instant case involving employee support for and common cause with other statutory employees' concerted activities.

Based on all the above and the record as a whole, I find therefore that the Charging Party in refusing to accept Respondent's assignment of Matlack employees' struck work was engaged in protected concerted activity. I also find that Respondent knew the basis for the Charging Party's refusal and terminated him as a consequence. Respondent's conduct therefore violates Section 8(a)(3) and (1) of the Act, and I so find. *Supermarkets General Corp*., supra. The General Counsel's complaint is sustained.

REMEDY

Having found Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The directed remedy here shall substantially follow the remedy directed in *ABS Co*., supra, as modified by current case authority respecting interest rates.

Having found that Respondent terminated the employment of Burnell Ware Jr. and failed and refused to reemploy him thereafter because he engaged in concerted activities for mutual aid and protection guaranteed by the Act, I shall recommend the Board order Respondent to offer him immediate reinstatement to his former position or, if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, by making payment to him of a sum of money equal to the amount he normally would have earned from the date of his termination to the date of his reinstatement, less his interim earnings, in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and its constituent locals are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Burnell Ware Jr. on April 11, 1991, because he engaged in concerted activities for mutual aid and protection guaranteed to employees by the Act.

4. The unfair labor practice described above is an unfair labor practice affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, American Transportation Service, Incorporated, Dickinson, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their protected concerted activities protected under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to employee Burnell Ware Jr. to the position he would have held, but for Respondent's wrongful discharge of him on April 11, 1991.

(b) Make whole employee Burnell Ware Jr. for any and all losses incurred as a result of Respondent's unlawful termination of him, with interest, as provided in the renedy section of this decision.

(c) Expunge from its files any and all references to the discharge of employee Burnell Ware Jr. and notify him in writing that this has been done and that the fact of his wrongful discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records,

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order and to ensure that this Order has been fully complied with.

(e) Post at its Dickinson, Texas facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, in English as such additional languages as the Regional Director determines are necessary to fully communicate with employees, on forms provided by the Regional Director for Region 16, after being signed by Respondent's authorized representative, shall be posted by Respondent at its Dickinson, Texas terminal immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

Included in the employee rights protected by Federal law under the Act is the right of employees to make common cause with other employees by refusing to do work which would normally be done by employees then on strike.

WE WILL NOT discharge our employees because they engage in protected concerted activities by refusing to do work that would normally be done by employees of another employer then on strike.

WE WILL NOT in any like or related manner violate the terms of the National Labor Relations Act.

WE WILL offer immediate and full reinstatement to employee Burnell Ware Jr. to the position he would have held, but for our wrongful discharge of him on April 11, 1991.

WE WILL make employee Burnell Ware Jr. whole, with interest, for any and all losses he may have suffered as a result of his discharge in the manner set forth in the remedy section of the decision underlying this notice.

WE WILL notify Burnell Ware Jr. that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

All our employees are free to engage in concerted activities for their mutual aid and protection within the meaning of Section 7 of the Act or to refrain from such activities.

AMERICAN TRANSPORTATION SERVICE, INCORPORATED